CALL, JENSEN & FERRELL
A Professional Corporation
Scott J. Ferrell, Bar No. 202091
David R. Sugden, Bar No. 218465
610 Newport Center Drive, Suite 700
Newport Beach, CA 92660
(949) 717-3000
sjferrell@calljensen.com
dsugden@calljensen.com

Attorneys for Defendant Mitec Telecom, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

B.I.P. CORPORATION, Plaintiff, vs. MITEC TELECOM, INC., AND DOES 1 TO 30, Defendant.	Case No. 08 CV 0313 H (CAB) **DEFENDANT MITEC TELECOM, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT** Date: August 11, 2008 Time: 10:30 a.m. Place: Courtroom 13 Complaint Filed: January 18, 2008 Trial Date: None Set

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 2

III. MEMORANDUM OF POINTS AND AUTHORITIES 4

A. Standards For Motion To Dismiss (FRCP 12(b)(6)) 4

B. Plaintiff's First Cause Of Action For Misappropriation Of Trade Secrets Fails To State A Valid Cause Of Action. 5

C. Plaintiff's Second Cause Of Action For Fraud And Deceit Fails To State A Valid Cause Of Action. 7

D. Plaintiff's Third Cause Of Action For Intentional Interference With Prospective Economic Relations Fails To State A Valid Cause Of Action. 10

E. Plaintiff's Fourth Cause Of Action, For Breach Of Covenant Of Good Faith And Fair Dealing. And Its Fifth Cause Of Action, For Breach Of Contract, Fail To State Valid Causes Of Action. 11

IV. CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

Accuimage Diagnostics Corp v. Terarecon, Inc.
260 F. Supp. 2d 941 (N.D. Cal. 2003) 10

Aulson v. Blanchard
83 F.3d 1 (1st Cir. 1996) 7

Balistreri v. Pacifica Police Department
901 F.2d 696 (9th Cir. 1990) 5

DM Research Inc. v. College of American Pathologists
170 F.3d 53 (1st Cir. 1999) 7

In re Delorean Motor Co.
991 F.2d 1236 (6th Cir. 1992) 6

Display Research Laboratories, Inc. v. Telegen Corp.
133 F. Supp. 2d 1170 (N.D. Cal. 2001) 5

Epstein v. Wash. Energy Co.
83 F.3d 1136 (9th Cir. 1996) 5

Erie R.R. Co. v. Thompkins
304 U.S. 64, 58 S. Ct. 817 5

Hanna v. Plumer
380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965) 5

K-Lath v. Davis Wire Corp.
15 F. Supp. 2d 952 (C.D. Cal. 1998) 5

NTN Communications, Inc. v. Interactive Network, Inc.
1995 U.S. Dist. LEXIS 20322 (N.D. Cal. 1995) 5

Pickern v. Pier I Imports
339 F. Supp. 2d 1081 (E.D. Cal. 2004) 6

Rutman Wine Co. v. E & J Gallo Winery
829 F.2d 729 (9th Cir. 1987) 4

Von Grabe v. Sprint PCS
312 F. Supp. 2d 1285 (S.D. Cal. 2003) 8

STATE CASES

Allen v. Ramsay
179 Cal. App. 2d 843 (1960) 7, 8

Committee on Children's Television, Inc. v. General Foods Corp.
35 Cal. 3d 197 (Cal. 1983) 7

Conrad v. Bank of America
58 Cal. App. 4th 133, 53 Cal. Rptr. 2d 336 (1996) 7, 8

Della Penna v. Toyota Motor Sales, U.S.A., Inc.
11 Cal. 4th 376 (1995) 10

Foley v. Interactive Data Corp.
47 Cal. 3d 654 (1988) 12

Freeman & Mills, Inc. v. Belcher Oil Co.
11 Cal. 4th 85 (1995) 12, 13

Hall v. Department of Adoptions
47 Cal. App. 3d 898 (1975) 8

Hauter v. Zogarts
14 Cal. 3d 104 (1975) 10

Hunter v. Up-Right Inc.
6 Cal. 4th 1174 (1993) 12

J'Aire Corp. v. Gregory
24 Cal. 3d 799 (1979) 10

Kransko v. America Empire Surplus Lines Insurance Co.
23 Cal. 4th 390 (2000) 12

Lazar v. Superior Court
12 Cal. 4th 631 (1996) 8

Martin v. U-Haul Co. of Fresno
204 Cal. App. 3d 396 (1988) 12

National Medical Transportation Network v. Deloitte & Touche
62 Cal. App. 4th 412 (1998) 10

Perry v. Robertson
201 Cal. App. 3d 333 (1988) 6, 11

Roberts v. Ball, Hunt, Hart, Brown and Baerwitz
57 Cal. App. 3d 104 (1976) 9

Rogoff v. Grabowski
200 Cal. App. 3d 624 (1988) 12

Wilhelm v. Pray, Price, Williams & Russell
186 Cal. App. 3d 1324 (1986) 7

Wilke v. Coinway, Inc.
257 Cal. App. 2d 126 (1967) 10

FEDERAL STATUTES

F.R.C.P. 1 4

F.R.C.P. 9(b) 8

FRCP 12(b)(6)) 1, 4

STATE STATUTES

Cal. Civ. Code § 3426.1(b) 5

I. INTRODUCTION

In the apparent belief that just adding additional detail will enable its Second Amended Complaint to pass muster, Plaintiff demonstrates yet again that it simply does not have the wherewithal to allege against Mitec causes of action for misappropriation of trade secrets; fraud and deceit; interference with prospective economic advantage; breach of the implied covenant of good faith and fair dealing; and breach of contract. Most particularly, Plaintiff's tactic of inserting allegations concerning purported written agreements – without attaching those agreements as exhibits or quoting them in full or setting forth their full content – plainly is not enough to sustain claims based on those agreements.

This defect is fatal to at least four of Plaintiff's five causes of action. First, notwithstanding the discussion of these supposed written agreements, Plaintiff still does not properly allege the existence of a trade secret; the alleged efforts Plaintiff made to develop its customer list and then maintain its confidentiality do not rise to the level necessary to demonstrate why or how that information should be protected as a trade secret, thus dealing a mortal blow to the cause of action for misappropriation of trade secrets. And because Plaintiff does not properly allege the existence of a trade secret, its cause of action for intentional interference with prospective economic advantage fails as well.

Plaintiff's failure to allege supposed written and other agreements to the degree required also disables its causes of action for breach of contract and for breach of the implied covenant of good faith and fair dealing. What is more, as in its previous complaint, Plaintiff simply does not, and cannot, demonstrate how it can recover for any alleged breach of the implied covenant of good faith and fair dealing. Outside the special relationship of an insurer and its insured, California law does not recognize breach of the covenant of good faith and fair dealing as a valid theory for tort recovery.

Finally, in its purported cause of action for fraud and deceit, Plaintiff sets forth a lengthy list of supposed false representations made by Mitec's representatives, but, in their totality, those alleged statements are nothing more than statements about the future and the hoped-for result that the products delivered to Plaintiff would be free of defects. In substance, Plaintiff is trying, yet again, to turn a defective products claim into a fraud action, and despite what apparently are its best efforts, it cannot do that.

For these reasons, as explained in greater detail below, Plaintiff's Second Amended Complaint must be dismissed.

II. FACTUAL BACKGROUND

According to Plaintiff's Second Amended Complaint, Mitec is a manufacturer and primary supplier of telecommunications equipment, which Plaintiff sold. (Second Amended Compl., ¶¶ 6-7.) Plaintiff alleges that on or about June 2, 2005, representatives of Plaintiff and Mitec met and executed a non-disclosure agreement which prohibited the disclosure by Mitec of "confidential information," including customer information, except "to carry out discussions concerning, and the undertaking of, the relationship." (Second Amended Compl., ¶¶ 9-13.) No copy of the alleged written agreement is attached as an exhibit to the Second Amended Complaint, and the full provisions and import of that agreement are not described.

Plaintiff also alleges that on or about July 25, 2006, Plaintiff and Mitec entered into a written "bill and hold agreement" dealing with prospective sales of product by Mitec to Plaintiff, which provided that Mitec would be responsible for any defects in that product. (Second Amended Compl., ¶¶ 14-16.) Again, no copy of the alleged written agreement is attached as an exhibit to the Second Amended Complaint, and the full provisions and import of that agreement are not set forth.

Plaintiff also alleges that on October 24, 2006, the parties met "and negotiated for an increase in the sale of telecommunications product. ..." (Second Amended Compl., ¶ 17.) This allegation is, interestingly, much less detailed than that contained in Plaintiff's previous First Amended Complaint, where Plaintiff alleged that on that same day, the parties allegedly entered into an "oral agreement" wherein Mitec agreed to (1) sell telecommunications equipment to Plaintiff; (2) set aside warehouse space in Canada wherein it would store BIP's telecommunications products; and (3) ship product to Plaintiff as needed by Plaintiff or Plaintiff's customers. Mitec allegedly agreed to provide each product in working condition, free of defects, and warranted for at least two years. (First Amended Compl., ¶ 7.) What is more, that prior pleading contained no reference to the two purported written agreements alleged in the Second Amended Complaint, which, again, are not attached to the current pleading and are described only in bare-bones terms.

Plaintiff alleges, additionally, that in 2007, Plaintiff "entered into several purchase agreements by issuing purchase orders to Mitec totaling approximately $3.5 million dollars." (Second Amended Compl., ¶ 18.) (In the First Amended Complaint, the amount was over $5 million. (First Amended Compl., ¶ 8.)) None of the purchase orders or any related agreements is attached to the pleading. Plaintiff then alleges, among other things, that in December 2006 and January 2007, Mitec shipped defective equipment to Plaintiff that Mitec's sales vice-president allegedly admitted were defective, but that ultimately were deemed by Mitec to be in working condition. (Second Amended Compl., ¶¶ 19-26.) According to the pleading, in June 2007, Plaintiff requested that the products in the warehouse be shipped to San Marcos. (Second Amended Compl., ¶ 26.) According to Plaintiff, the products would have been worth $2 million if they were in good working condition. (Second Amended Compl., ¶ 25.)

Meanwhile, Plaintiff contends, as it did in its previous pleading, that it was in possession of a customer list identifying those customers that regularly purchased telecommunications equipment from Plaintiff. (Second Amended Compl., ¶ 27.) Plaintiff contends that it made efforts to keep the customer list confidential by requiring its employees and others to sign confidentiality agreements, including the purported June 2, 2005 agreement with Mitec. (Second Amended Compl., ¶¶ 28-29.) None of these purported agreements is attached to the pleading or described in more than cursory terms. Plaintiff then alleges that in spite of these purported confidentiality agreements and efforts to keep its customer list confidential, Mitec, beginning in May 2007, used the list to solicit purchase orders from Plaintiff's customers, and continued doing so despite Plaintiff's demands that the solicitations cease. (Second Amended Compl., ¶¶ 30-37.) (According to Plaintiff's First Amended Complaint, this alleged wrongdoing commenced in July 2007. (First Amended Compl., ¶ 17.))

Based on the foregoing, Plaintiff alleges causes of action for (1) misappropriation of trade secrets; (2) fraud and deceit; (3) intentional interference with prospective economic advantage; (4) breach of the covenant of good faith and fair dealing; and (5) breach of contract. As explained in greater detail below, Plaintiff's Second Amended Complaint is defective and must be dismissed.

III. MEMORANDUM OF POINTS AND AUTHORITIES

A. Standards For Motion To Dismiss (FRCP 12(b)(6))

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 732 (9th Cir. 1987).[1] Although "all allegations of fact are taken

[1] The manner and details of pleading in the federal court are governed by the Federal Rules of Civil Procedure regardless of the substantive law to be applied in a particular action. *See* F.R.C.P. 1;
Continued on the next page

as true and construed in the light most favorable" to the plaintiff, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *K-Lath v. Davis Wire Corp.*, 15 F. Supp. 2d 952, 963 (C.D. Cal. 1998); *see also Display Research Laboratories, Inc., et al., v. Telegen Corp.*, 133 F. Supp. 2d 1170, 1176, 2001 U.S. Dist. LEXIS 4710 (N.D. Cal. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *see also NTN Communications, Inc. v. Interactive Network, Inc.*, 1995 U.S. Dist. LEXIS 20322 at * 4 (N.D. Cal. 1995) (same).

B. Plaintiff's First Cause Of Action For Misappropriation Of Trade Secrets Fails To State A Valid Cause Of Action.

To state a cause of action for misappropriation of trade secrets under the Uniform Trade Secrets Act ("UTSA"), plaintiff must plead two primary elements: (1) the existence of a trade secret, and (2) misappropriation of the trade secret. See Cal. Civ. Code § 3426.1(b).

Dismissal is warranted where Plaintiff's allegations amount to pleading the legal conclusion of trade secret misappropriation. *See, e.g., Display Research Laboratories, Inc. v. Telegen Corp.*, 133 F. Supp. 2d 1170, 1176 (N.D. Cal. 2001) (dismissing a Lanham Act claim based on similarly conclusory allegations lacking factual support). In *Display Research*, the court rejected the only factual allegation supporting plaintiff's assertion that defendant had misrepresented the origin of work as "too generic." In

---

Continued from the previous page
Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) (the Federal Rules govern issues concerning the adequacy of the pleadings). In diversity actions, California substantive law is applied to determine the validity of the plaintiff's claims. *See Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82. L.Ed. 1188 (1938).

dismissing the claim, the court stated: "conclusory allegations are insufficient to state a claim for purposes of a Rule 12(b)(6) motion." *Id.* *See also In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1992) (pleading standard "requires more than the bare assertion of legal conclusions").

In its Second Amended Complaint, Plaintiff attempts to cure the plain deficiencies of its previous pleading by alleging two written agreements, including one purported non-disclosure agreement with Mitec, and asserting that it entered into confidentiality agreements with its employees and others. Unfortunately for Plaintiff, these additional allegations are not good enough. First, as noted above, the purported written agreements are not attached as exhibits, and are described only in the most bare-bones fashion. It is true that although a written agreement is generally attached as an exhibit to a complaint, it need not be so long as the complaint alleges the making of the agreement and the substance of its relevant terms. (*See Perry v. Robertson,* 201 Cal.App.3d 333, 341 (1988).) But Plaintiff's First Amended Complaint does not even conform to this standard. The description of the purported non-disclosure agreement of June 2, 2005 only sets forth very general allegations as to what Mitec may have agreed to, without specifying in any detail the substance of the full agreement or what its full import was intended to be. And the mere allegation that Plaintiff entered into confidentiality agreements with its employees and others simply is not enough, without more, to demonstrate that Plaintiff's "customer list" was a trade secret. There is no description of what those purported agreements consisted of, or of what the parties actually agreed to. Under these circumstances, Plaintiff yet again fails to describe how, if at all, it ensured that its employees or anyone else would not disclose or provide the customer list to others.

"While a plaintiff is not required to plead *detailed* facts, she must plead *some* facts." *Pickern v. Pier I Imports,* 339 F. Supp. 2d 1081, 1088 (E.D. Cal. 2004) (emphasis in original); *DM Research Inc. v. College of American Pathologists,* 170 F.3d 53, 55 (1st Cir. 1999) (while the complaint need not provide evidentiary detail "the price of entry, even to discovery, is for plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.") (emphasis in original).

Yet again, Plaintiff's trade secret claim is based *entirely* on Plaintiff's unsupported and unwarranted conclusions that it possessed a valid trade secret. Plaintiff's extensive additional allegations concerning purported steps it took to keep the "customer list" secret simply do not remedy the defects in its previous pleadings. As one court has directed, courts need not "swallow the plaintiff's invective hook, line and sinker: bald assertions, unsupportable conclusions, periphrastic circumlocutions and the like need not be credited." *Aulson v. Blanchard,* 83 F.3d 1, 3 (1st Cir. 1996). Because Plaintiff has failed yet again to allege the existence of a trade secret, any misappropriation is not actionable, and Plaintiff's first cause of action must be dismissed.

C. Plaintiff's Second Cause Of Action For Fraud And Deceit Fails To State A Valid Cause Of Action.

Fraud is an *intentional* tort, the elements of which are a "false representation as to a material fact, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage." *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App. 3d 1324, 1331 (1986). Fraud is a "disfavored" action "involv[ing] a serious attack on character" and, as such, is subject to heightened and particularized pleading standards. *Allen v. Ramsay*, 179 Cal. App. 2d 843, 848 (1960); *see also Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 216 (Cal. 1983); *Conrad v. Bank of America,* 58 Cal. App. 4th 133, 156, 53 Cal. Rptr. 2d 336 (1996) ("fraud is a charge that is easily made but less often substantiated"). When pleading fraud claims in district court, a plaintiff must meet the requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which states that, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." F.R.C.P. 9(b). General pleading of the legal conclusion of fraud is insufficient. *See Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1305 (S.D. Cal. 2003) citing *Conrad*, 45 Cal. App. 4th at 156.

Likewise, under California law, each element of a claim for fraud, including the circumstances and nature of the misrepresentation, must be pleaded with particularity. California precedent unequivocally directs that these heightened pleading standards must be enforced. *See, e.g., Hall v. Department of Adoptions*, 47 Cal. App. 3d 898, 904 (1975) ("It is bad for courts to allow and lawyers to use vague but artful pleading of fraud simply to get a foot in the courtroom door."). As such,

> [T]he rule is everywhere followed that fraud must be specifically pleaded. The effect of this rule is twofold: (1) General pleading of the legal conclusion of "fraud" is insufficient; the facts constituting the fraud must be alleged; (2) every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings will not ordinarily be involved to sustain a pleading defective in any material respect.

Allen, 179 Cal. App. 2d at 848 (emphasis added).

When fraud is alleged against a corporate defendant, a plaintiff must allege the names of persons who made the fraudulent misrepresentations, their authority to speak, to whom they spoke, what they said or wrote, and what was said or written. *Lazar v. Superior Court*, 12 Cal.4th 631 (1996). *Every element* of a cause of action for fraud must be alleged in proper manner and *facts constituting* fraud must be alleged with specificity to allow the defendant to understand fully the nature of the charges made. *Roberts v. Ball, Hunt, Hart, Brown and Baerwitz*, 57 Cal. App. 3d 104 (1976).

In its previous pleading, Plaintiff manifestly failed to meet these requirements. Indeed, Plaintiff failed to plead fraud with any particularity. While Plaintiff complained that Mitec failed to provide products free of defects, failed to honor its warranties, and failed to maintain the confidentiality of Plaintiff's customer lists, wholly absent from Plaintiff's complaint was the name of the person who spoke, their authority to speak, to whom they spoke, what was said, and what was said or written. Without these requisite allegations, Plaintiff' fraud cause of action failed and was dismissed.

In the Second Amended Complaint, Plaintiff attempts to remedy these deficiencies by including a large amount of material entirely missing from the previous version. The new material essentially amounts to a litany of purportedly false statements made by Mitec personnel regarding the quality of the product Mitec shipped to Plaintiff, and regarding the purportedly false representations made by Mitec personnel regarding the use of Plaintiff's "customer list." (Second Amended Compl., ¶¶ 41-62 (at what should have been paragraph 61, Plaintiff starts renumbering its paragraphs at no. 48).) To take the second point first, Plaintiff's fraud claim is based on representations allegedly made by Mitec in the purported June 2, 2005 written non-disclosure agreement, and for the reasons set forth above, that alleged agreement is not a sufficient basis for any other claim, including this fraud claim.

As for the alleged representations concerning the quality of the product, they were nothing more than the opinion of the Mitec personnel concerning the product and concerning what would happen in the future, i.e., that any defects had been and would be remedied. It is established law that statements of opinion generally are not actionable because a plaintiff cannot show justifiable reliance on statements of opinion. (*See Wilke v. Coinway, Inc.*, 257 Cal.App.2d 126, 136 (1967).) Indeed, a special type of opinion, known as "puffing," which may be the exaggerated opinion of a seller about his or her products, may not be the basis for a fraud claim. (*Hauter v. Zogarts,* 14 Cal.3d 104, 111 n.5 (1975).) While it is true that some statements of a seller regarding his or her products have been held actionable as statements of fact, that simply cannot be the case here. What Plaintiff alleges Mitec's representatives said simply does not rise to that level; those representatives simply stated their opinion about the product, and their opinion as to what would happen *in the future*. Again, Plaintiff is trying to turn a defective products claim into a fraud action, and despite what apparently are its best efforts, it cannot do that.

D. Plaintiff's Third Cause Of Action For Intentional Interference With Prospective Economic Relations Fails To State A Valid Cause Of Action.

To assert an interference with prospective economic advantage claim, whether intentional or negligent, a plaintiff has the burden of pleading and proving that the defendant's interference was wrongful "by some measure beyond the fact of the interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 392-393 (1995); *National Medical Transportation Network v. Deloitte & Touche*, 62 Cal. App. 4th 412, 439-440 (1998). And, to state a claim for *negligent* interference with economic advantage, a plaintiff must also allege defendant owed plaintiff a duty of care in addition to the elements required to state a cause of action for intentional interference with economic advantage. *J'Aire Corp. v. Gregory*, 24 Cal.3d 799, 803-04 (1979); *Accuimage Diagnostics Corp v. Terarecon, Inc.*, 260 F.Supp.2d 941, 957 (N.D. Cal. 2003).[2] In the present case, Plaintiff's interference with prospective economic relations

[2] Nowhere do Plaintiffs allege, nor could they allege, that Defendants owed a duty of care to Plaintiffs. Accordingly, Plaintiffs cannot sustain a cause of action for negligent interference with prospective economic advantage.

cause of action is yet again predicated on Plaintiff's defective misappropriation of trade secrets claim. Because that cause of action fails, Plaintiff's interference cause of action fails as well and must be dismissed.

E. Plaintiff's Fourth Cause Of Action, For Breach Of Covenant Of Good Faith And Fair Dealing. And Its Fifth Cause Of Action, For Breach Of Contract, Fail To State Valid Causes Of Action.

Plaintiff's Fourth Cause of Action, for breach of the implied covenant of good faith and fair dealing, and its Fifth Cause of Action, for breach of contract, are based upon Mitec's alleged breach of two purported written agreements, the alleged June 2, 2005 non-disclosure agreement, and the purported July 26, 2006 "bill and hold" agreement. (Second Amended Compl., ¶¶ 84-105.) As noted above, no copies of the alleged written agreements are attached as an exhibit to the Second Amended Complaint, and the full provisions and import of those agreements are not set forth. Again, it is true that although a written agreement is generally attached as an exhibit to a complaint, it need not be so long as the complaint alleges the making of the agreement and the substance of its relevant terms. (*See Perry, supra,* 201 Cal.App.3d at 341.) But Plaintiff's First Amended Complaint does not even conform to this standard. The description of the purported non-disclosure agreement of June 2, 2005 only sets forth very general allegations as to what Mitec may have agreed to, without specifying in any detail the substance of the full agreement or what its full import was intended to be. The same defects are present in the description of the "bill and hold" agreement; again, the description only sets forth in a general way the particulars of what Mitec agreed to do with respect to delivering product to Plaintiff and with respect to the quality of the product delivered. On this basis alone, both of these causes of action fail, and should be dismissed.

The cause of action for breach of the implied covenant of good faith and fair dealing is fatally deficient for another reason. Though the law implies a covenant of good faith and fair dealing in all contracts, see Rest.2d Contracts § 205, it does not give rise to a tort cause of action except in very limited cases not applicable here. *See Rogoff v. Grabowski*, 200 Cal. App. 3d 624, 628 (1988); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 102-103 (1995). Because the covenant is a contract term, compensation for breach of the covenant "has almost always been limited to contract rather than tort remedies." *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684 (1988). The *Seaman's* court "cautioned against extending tort liability for breach of the implied covenant of good faith and fair dealing beyond parties with *special relationships* to ordinary commercial contracts" because, in ordinary commercial contracts, "'parties of roughly equal bargaining power are free to shape the contours of their agreement . . . . They may not be permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured.'" *Rogoff v. Grabowski*, 200 Cal. App. 3d at 628-29 (citing *Seaman's*, 36 Cal. 3d at 759) (emphasis added). A limited exception to the general rule has developed "in the context of insurance contracts where, for a variety of policy reasons, courts have held that breach of the implied covenant will provide the basis for an action in tort." *Foley*, 47 Cal.3d at 684; *see also Kransko v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400 (2000).

Accordingly, liability for breach of the covenant of good faith and fair dealing in tort has been limited to the insurance context. *See, e.g., Hunter v. Up-Right Inc.*, 6 Cal. 4th 1174 (1993) (no cause of action for breach of covenant of good faith and fair dealing in context of employer/employee relationship); *Rogoff v. Grabowski*, 200 Cal. App. 3d 624 (1988) (no cause of action for breach of covenant of good faith and fair dealing—limousine rental service and customer); *Martin v. U-Haul Co. of Fresno*, 204

Cal.App.3d 396 (1988) (no "special relationship" exists); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85 (1995).

In the present case, although it is not explicit clear from the pleading, Plaintiff appears to be seeking recovery *in tort* for breach of the implied covenant. That it plainly cannot do. The alleged agreements, even if they were set forth in sufficient fashion to support a breach of contract action – which they are not – are not insurance contracts. Accordingly, Plaintiff may not recover in tort for breach of the implied covenant.

IV. CONCLUSION

For the foregoing reasons, Mitec respectfully requests that the Court grant its motion to dismiss Plaintiff's Second Amended Complaint.

Dated: July 7, 2008

CALL, JENSEN & FERRELL
A Professional Corporation
SCOTT J. FERRELL
DAVID R. SUGDEN

By: */s/ David R. Sugden*
DAVID R. SUGDEN

Attorneys for Defendant Mitec Telecom, Inc.

CERTIFICATE OF SERVICE
(United States District Court)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 610 Newport Center Drive, Suite 700, Newport Beach, CA 92660.

On July 7, 2008, I served the foregoing document described as **DEFENDANT MITEC TELECOM, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT** on the following person(s) in the manner(s) indicated below:

SEE ATTACHED SERVICE LIST

[X] (BY ELECTRONIC SERVICE) I am causing the document(s) to be served on the Filing User(s) through the Court's Electronic Filing System.

[ ] (BY MAIL) I am familiar with the practice of Call, Jensen & Ferrell for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Call, Jensen & Ferrell, Newport Beach, California, following ordinary business practices.

[ ] (BY OVERNIGHT SERVICE) I am familiar with the practice of Call, Jensen & Ferrell for collection and processing of correspondence for delivery by overnight courier. Correspondence so collected and processed is deposited in a box or other facility regularly maintained by the overnight service provider the same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope designated by the overnight service provider with delivery fees paid or provided for, addressed as set forth herein, and such envelope was placed for delivery by the overnight service provider at Call, Jensen & Ferrell, Newport Beach, California, following ordinary business practices.

[ ] (BY FACSIMILE TRANSMISSION) On this date, at the time indicated on the transmittal sheet, I transmitted from a facsimile transmission machine, which telephone number is (949) 717-3100, the document described above and a copy of this declaration to the person, and at the facsimile transmission telephone numbers, set forth herein. The above-described transmission was reported as complete and without error by a properly issued transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission.

[ ] (BY E-MAIL) I transmitted the foregoing document(s) by e-mail to the addressee(s) at the e-mail address(s) indicated.

[X] (FEDERAL) I declare that I am a member of the Bar and a registered Filing User for this District of the United States District Court.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Certificate is executed on July 7, 2008, at Newport Beach, California.

/s/ David R. Sugden
David R. Sugden

SERVICE LIST

Arnold Hernandez, Esq.
Law Office of Arnold Hernandez
P.O. Box 1419
1650 Linda Vista Drive, Suite 101
San Marcos, CA 92079
Tel: (760) 471-4624

Attorneys for Plaintiff B.I.P. Corporation